In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 881

DAYTON FOOD FAIR STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-28) is reported at 399 F. 2d 153. The Board's decision and order (Pet. App. 29-31) are reported at 165 NLRB No. 12.

JURISDICTION

The decision of the court of appeals was entered on August 2, 1968 and a petition for rehearing was de-

nied on October 3, 1968. The petition for a writ of certiorari was filed on December 28, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the employer threatened to discharge employees if they engaged in a strike, and thereby violated Section 8(a)(1) of the National Labor Relations Act.

2. Whether the notice-posting portion of the Board's order was rendered moot by subsequent events or is excessively broad.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are set out in the Appendix to the petition, pp. 37-38.

STATEMENT

On February 8, 1966, Local No. 1552 of the Retail Clerks International Association, AFL-CIO, began an organizing campaign among the approximately 40 employees at petitioner's retail food store (R. 5; 35-36, 50-51).[1] One week later, having received 25 signed employee authorization cards, the Union informed the Company that it had attained majority status and demanded recognition as the employees' exclusive bar-

[1] References to the joint apendix filed by the parties in the court below are designated by the abbreviation "R".

gaining representative (R. 6-7; 36-37). The Company rejected this demand, insisting upon a Board-conducted representation election (R. 5; 37). The Union immediately filed a petition for an election, a consent election agreement was signed, and an election was scheduled for April 14 (R. 5; 37-38).

On April 7, the Company distributed to its employees a leaflet which stated:

> * * * [U]nder the law and National Labor Relations Board decisions even if the Union would win the election, the Company is *not* required to agree to any—*not even one*—Union demand. The *Company could still refuse* any demand the Union might make if the Company in good faith bargaining believed it was in the Company's interest to refuse such demands.
>
> The only recourse the Union would have if their demands were not met would be a strike. * * * [U]nder the law and the National Labor Relations Board decisions, if the Union calls an economic strike *every employee who leaves his or her job can be fired at once and permanently replaced.* [R. 72-74, emphasis in the original.]

A letter accompanying the leaflet repeated the assertion that the Company had the right to "fire" employees engaged in an economic strike, stating:

> [I]sn't it logical to expect that if they do not carry out their promises, to save face they will call an economic strike? Who will suffer? Whose pay stops? *Whom does the law allow the company to fire and permanently replace?* You know who. * * * [R. 74-78, emphasis added.]

The Union was defeated in the April 14 election, and filed objections thereto and unfair labor practice charges based on the Company's pre-election conduct (R. 5).

The Board found that the Company had violated Section 8(a)(1) of the Act by "misleading its employees with the statements [in the April 7 leaflet and letter] that they could lawfully be discharged in the event they should engage in a strike," statements which "unlawfully coerced them in their free exercise of the right to engage in concerted activities" (Pet. App. 33-34).[2] Accordingly, the Board set aside the election and directed another to be held. It also ordered the Company to cease and desist from the unfair labor practice found and to post a notice which stated, *inter alia*, "We will not tell our employees that they * * * may lawfully be discharged for engaging in strike action" (Pet. App. 30-31, 35-37). The proposed notice also included a paragraph, common to all Board remedial orders of this sort, promising generally to refrain from violations of the Act "in any like or related manner."

The court of appeals sustained the Board's unfair labor practice finding, holding that "the clear import of the company's letter is that if employees participated in a strike their jobs would be automatically terminated"; accordingly, it enforced the Board's order (Pet. App. 28). In the court of appeals, the

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[2] The Board also found that the Company violated Section 8(a)(1) by the statements of assistant store manager Davis. However, the court of appeals set aside this finding (Pet. App. 27), and the Board will not contest that ruling here.

Company argued for the first time that the posting provision of the Board's order was moot or, if not, in excess of the Board's remedial power.[3]

ARGUMENT

1. Although an employer may permanently replace economic strikers, he may not discharge them until a permanent replacement has been found. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346; *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375. Thus, while an employer is entitled under Section 8(c) of the Act to inform employees of his power permanently to replace them if they engage in an economic strike,[4] his remarks become coercive and thus violate Section 8(a)(1) if he indicates that strike activity will result in immediate discharge.[5] Whether the statements contained in the April 7 leaflet and letter amounted to such coercion, as the Board and the court below found, presents what is essentially a factual issue not warranting further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

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[3] By this time, the Union had lost the rerun election; the Board subsequently certified the results thereof.

[4] See *National Labor Relations Board* v. *Herman Wilson Lumber Co.*, 355 F. 2d 426 (C.A. 8); *Texas Industries, Inc.* v. *National Labor Relations Board*, 336 F. 2d 128, 130-131 (C.A. 5).

[5] See *Collins Baking Co.* v. *National Labor Relations Board*, 193 F. 2d 483, 486 (C.A. 5); *Shattuck Denn Mining Corp.* v. *National Labor Relations Board*, 362 F. 2d 466, 470-471 (C.A. 9); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 905 (C.A. 9).

In any event, since these communications twice speak of being "fired" before referring to "permanent replacement" (see *supra*, p. 3), the Board reasonably concluded that the employees would be likely to interpret them as warning of automatic loss of their jobs if they struck.[6]

2. Petitioner's contention that the Board's notice-posting requirement should not be enforced because of mootness (Pet. 21-23) rests on the assumption that the effects of the unfair labor practice must be considered to have been dissipated since a second election was held (n. 3 *supra*). But that action was merely an effort to insure that the employees' election rights would not be further eroded by the passage of time; it does not negate the need to secure a full remedy for the unfair labor practice. The Company's employees have never been informed authoritatively that economic strikers are protected from discriminatory discharge; the posting requirement serves this purpose, and thereby clears the air for any future organizational activity among the employees. Finally, the challenge to the order's breadth, never made before the Board, comes too late, *National Labor Relations Board*

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[6] The coercive impact on the employees was not diminished even if, as petitioner contends, its statements were "an honest and careless misstatement of law" (Pet. 7). But compare the April 7 communications with the Company's letter of March 29, which correctly noted (R. 70):

> No union can force an employer to sign a contract which the employer believes to be unreasonable or which the employer believes will cause or increase loss. * * * If employees strike to attempt to enforce economic demands, they can be permanently replaced and cannot collect any unemployment compensation.

v. *Marshall Field & Co.*, 318 U.S. 253; moreover, since the order prohibits only violations of the Act "in any like or related manner," it is not unduly broad, *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 436; *May Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 392-393.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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